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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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ANGEL TORRES,

Petitioner,

v.

DWIGHT NEVEN, et al.,

Respondents.

Case No. 2:16-cv-00443-GMN-CWH

ORDER

This *pro se* habeas matter comes before the Court on petitioner's motion for leave to file a second amended petition (ECF No. 30). Respondents have opposed (ECF No. 33), and petitioner has replied (ECF No. 34).

Petitioner initiated this action on March 1, 2016, with the filing of a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. The Court screened the petition and ordered service and a response. Respondents first filed a motion to dismiss on the grounds that some of the claims were procedurally defaulted and others noncognizable. The Court ruled on the motion, and dismissed Grounds 1 and 5 as procedurally defaulted and Ground 7 as noncognizable. Respondents filed an answer to the petition on February 21, 2018. (*See* ECF No. 8). Petitioner asserts that he deposited his motion for leave to amend with his institution's mailroom on March 4, 2018. (*See* ECF No. 34 at 3).

1 Habeas petitions may be amended “as provided in the rules of procedure applicable to civil  
2 actions,” but the Federal Rules of Civil Procedure apply only “to the extent they are not  
3 inconsistent with any statutory provisions, or” the Rules Governing Section 2254 Cases. 28 U.S.C.  
4 § 2242; Rule 12 of the Rules Governing Section 2254 Cases in the United States District Courts.  
5 Rule 15(a)(1) allows a plaintiff the right to amend once as a matter of course within 21 days of  
6 service of the complaint, or within the earlier of 21 days after service of a responsive pleading or  
7 21 days after service of a motion under Rule 12(b), (e), or (f). Otherwise, amendment is allowed  
8 only with the opposing party’s written consent or with leave of court. Fed. R. Civ. P. 15(a)(2).

9 Petitioner argues that his amendment is proper as a matter of course pursuant to Federal  
10 Rule of Civil Procedure 15(a)(1)(B) because he submitted his proposed amended petition within  
11 21 days of the filing of the answer. Respondents argue that Rule 15(a)(1)(B) conflicts with the  
12 habeas rules by allowing amendment after an answer because the habeas rules contemplate only a  
13 reply after an answer. Respondents further argue that, even if Rule 15(a)(1)(B) can apply in this  
14 context, petitioner did not file his proposed amended petition within the timeline set forth in the  
15 rule.

16 While the Court is not persuaded by respondents’ argument that Rule 15(a)(1) conflicts  
17 with the habeas rules in this context, it is persuaded that petitioner’s amended petition was not  
18 timely filed pursuant to Rule 15(a)(1)(B) and therefore cannot be considered an amendment of  
19 right.

20 The Court accepts as true petitioner’s representation that he delivered his proposed  
21 amended petition to his institution’s mailroom for filing on March 4, 2018, even though the  
22 document was apparently not actually mailed until several weeks later. That would mean he  
23 effectively filed his proposed amended petition within 21 days after respondents served him with  
24 their answer. Nevertheless, Rule 15(a)(1) provides for an amendment of right within 21 days of  
25 the *earlier* of service of a responsive pleading (*i.e.*, an answer) *or* service of a motion pursuant to

1 Rule 12(b), (e) or (f). Respondents filed a motion to dismiss on October 31, 2016.<sup>1</sup> The deadline  
2 for petitioner to file a petition as a matter of course under Rule 15(a)(1)(B) therefore expired long  
3 before he submitted his proposed amended petition. Under the express language of Rule  
4 15(a)(1)(B), petitioner was not entitled to a renewed period to amend as a matter of right after the  
5 respondents filed their answer. *See Ramirez v. County of San Bernardino*, 806 F.3d 1002, 1008  
6 (9th Cir. 2015). Accordingly, petitioner’s motion to amend his complaint as a matter of course will  
7 be denied.

8 Petitioner may therefore amend only with leave of court. Under Federal Rule of Civil  
9 Procedure 15(a)(2), leave to amend should be freely given “when justice so requires.” But leave  
10 to amend “is not to be granted automatically,” and the court “considers the following five factors  
11 to assess whether to grant leave to amend: (1) bad faith, (2) undue delay, (3) prejudice to the  
12 opposing party, (4) futility of amendment; and (5) whether plaintiff has previously amended his  
13 complaint.” *In re W. States Wholesale Natural Gas Antitrust Litig.*, 715 F.3d 716, 738 (9th Cir.  
14 2013) (internal punctuation omitted). Whether a claim is exhausted is a relevant consideration in  
15 determining whether amendment would be futile. *See Caswell v. Calderon*, 363 F.3d 832, 837-38  
16 (9th Cir. 2004).

17 Following review of the original and proposed amended petitions in this case, it is clear  
18 that many of the new claims petitioner seeks to add are not exhausted, including but not limited to  
19 Grounds 2, 7 and 8. (ECF No. 30-2 at 10, 35 & 39). In addition, petitioner seeks to reintroduce  
20 claims that the Court has already dismissed with prejudice, although he asks the Court to reconsider  
21 dismissal of those claims “based on the facts in the second amended petition.” (*See* ECF No. 30 at  
22 16). Petitioner’s arguments that the Court may excuse his failure to exhaust and should reconsider  
23 its earlier dismissal of Grounds 1, 5 and 7 are not persuasive. Thus, petitioner’s amendment would,  
24 in large part, be futile.

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25 <sup>1</sup> While the motion to dismiss was not filed expressly pursuant to Rule 12(b), it sought dismissal of several of the  
26 claims on both procedural grounds and on the grounds that they failed to state a claim. The motion was therefore,  
27 if not expressly at least implicitly, a motion pursuant to Rule 12(b). *See Lively v. Ballard*, 2016 WL 4581420, at \*7  
28 (S.D. W. Va. June 3, 2016), *report and recommendation adopted*, 2016 WL 4582076 (S.D. W. Va. Sept. 1, 2016); *Purdy*  
*v. Bennett*, 214 F. Supp. 2d 348, 353 (S.D.N.Y. 2002).

1 To the extent petitioner seeks to add claims that have been exhausted, or to include  
2 additional factual allegations to the claims already in the petition, he has failed to provide good  
3 cause for his failure to include the claims and allegations in his original federal petition.

4 Finally, petitioner has unduly delayed in seeking to amend his petition. Petitioner initiated  
5 this action more than two years ago and did not seek leave to amend until respondents' motion to  
6 dismiss had been fully resolved and respondents had filed an answer.

7 Accordingly, petitioner's motion to amend will be denied on the basis that petitioner has  
8 unduly delayed, has failed to establish good cause for the failure to include his new claims and  
9 additional allegations in the original petition, and because amendment would, as to many of the  
10 new claims, be futile. Insofar as petitioner seeks to add additional factual allegations to his existing  
11 claims in response to respondents' arguments, in their answer, that the claims lack factual  
12 specificity, those allegations are more appropriately raised in the reply.

13 In accordance with the foregoing, IT IS HEREBY ORDERED that petitioner's motion for  
14 leave to amend (ECF No. 30) is DENIED.

15 IT IS FURTHER ORDERED that to the extent petitioner seeks reconsideration of the  
16 Court's order on respondents' motion to dismiss, the motion is DENIED WITHOUT PREJUDICE.  
17 Should petitioner wish to file a renewed motion for reconsideration, he should specify what facts  
18 and arguments justify reconsideration on each claim. A conclusory request that the Court  
19 reconsider "based on the facts in the second amended petition" will again be summarily denied.

20 IT IS FURTHER ORDERED that petitioner shall file any reply to the respondents' answer  
21 within thirty days of the date of this order. Petitioner may include additional facts in the reply to  
22 the extent necessary to respondents' arguments, in the answer, that the petition lacks certain factual  
23 details.

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1 IT IS FURTHER ORDERED that respondents will be granted leave to file a supplemental  
2 answer addressing any newly raised factual allegations within thirty days of the filing of the reply.  
3 Petitioner will have fifteen days after the filing of any supplemental answer within which to file a  
4 supplemental reply.

5 IT IS SO ORDERED.

6 DATED THIS 22 day of May, 2018.

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10 GLORIA M. NAVARRO  
11 UNITED STATES DISTRICT JUDGE  
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